

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation) File No. 15-MD-2666
) (JNE/FLN)
) March 27, 2017
) Minneapolis, Minnesota
) Courtroom 9W
) 9:06 a.m.
)
)

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)

APPEARANCES

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(Appearances continued next page)

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23 Proceedings recorded by mechanical stenography;
24 transcript produced by computer.

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1 P R O C E E D I N G S

2 THE COURT: Okay. This is In Re Bair Hugger
3 Forced Air Warming Devices Products Liability Litigation,
4 and we have two motions. The first is the Defendant's
5 motion to compel, and second is the Defendant's motion for a
6 protective order. Let's get everybody's appearance on the
7 record. For the plaintiffs?

8 MR. HODGES: David Hodges here from Kennedy
9 Hodges.

10 MR. FARRAR: Kyle Farrar for the plaintiffs.

11 MS. ZIMMERMAN: Genevieve Zimmerman for the
12 plaintiffs.

13 MR. ASSAAD: Gabriel Assaad for plaintiffs.

14 MR. SACCHET: Michael Sacchet, plaintiffs.

15 MR. HULSE: Good morning, Your Honor. Ben Hulse
16 for the defendants.

17 THE COURT: Okay. Mr. Hulse, you're up.

18 MR. HULSE: All right. Thank you, Judge Noel.
19 Good morning.

20 First, is the defendant's motion to compel against
21 Kennedy Hodges. We're here on this motion, Your Honor,
22 because we have learned through the production that was
23 ordered by the Court from Augustine of the documents that
24 were on Augustine's privilege log, that Augustine's
25 privilege log was radically incomplete with respect to

1 communications with the Kennedy Hodges firm and was also
2 deceptive.

3 And what do I mean by "deceptive?" What I mean is
4 that the information that was contained on the log was in
5 several instances false making it difficult for both us and
6 the Court to assess the privilege. We have filed this
7 motion against Kennedy Hodges because our viewpoint is that
8 they had an obligation as both the other side of the
9 correspondence as having been held out as counsel for
10 Augustine, having been held out as being in a consulting
11 relationship with Augustine, and having also intervened in
12 these proceedings in the motion against Augustine to confirm
13 that Augustine's privilege logs were in fact complete and
14 accurate. Something they did not do.

15 How do we know that Augustine's privilege logs
16 were incomplete and deceptive? Well, one thing that we've
17 learned, Your Honor, and I'll use the Elmo here, is that
18 Mr. Benham set up an e-mail address or used an email
19 address, a Gmail address called kennedyhodgesllp@gmail.com,
20 under the name David Hodges. And I've highlighted, this is
21 one of the documents that was ordered produced to us. This
22 purports to be from David Hodges to David Hodges, which is a
23 little puzzling in itself, but then it is signed by Brandy.
24 There are multiple instances in the documents --

25 THE COURT: Let me just interrupt for a second and

1 say I do that all the time. That's how I keep my to-do
2 lists.

3 MR. HULSE: Is that right?

4 THE COURT: But go ahead.

5 MR. HULSE: You set up a Gmail address?

6 THE COURT: No, I send myself e-mails from the to
7 me.

8 MR. HULSE: Well, the interesting thing though,
9 Your Honor, is that this e-mail address, the name of the
10 e-mail address is David Hodges, kennedyhodgesllp@gmail.com,
11 but these are e-mails that are being sent by Randy Benham,
12 so it's unclear to us why this was done. And there are
13 multiple instances of this in the documents that were
14 produced to us, Your Honor. So why Randy Benham from
15 Augustine is using an e-mail address under the name of David
16 Hodges to send e-mails to David Hodges. But those e-mails
17 then appear, Your Honor, on Augustine's privilege log as
18 e-mails from David Hodges to David Hodges rather than
19 e-mails from Randy Benham to David Hodges, and this is a
20 recurring issue.

21 THE COURT: So let me ask you this though, are
22 there discovery requests that you have made to Kennedy
23 Hodges?

24 MR. HULSE: Absolutely, Your Honor. In fact, we
25 asked both an interrogatory and a document request to all

1 plaintiffs' counsel to produce communications with
2 Augustine. The Plaintiffs' Executive Committee, which
3 includes the Kennedy Hodges firm objected wholesale, based
4 on privilege to that. Your Honor actually gave an advisory
5 Order after a hearing that all plaintiffs' counsel needed to
6 respond to these. And so there clearly is a document
7 request that encompasses this. But this is just one of four
8 reasons why we know that the Augustine privilege log was
9 both inaccurate. And, again, putting aside this puzzle of
10 why Augustine's counsel is using the e-mail address David
11 Hodges, kennedyhodgesllp@gmail.com.

12 Second, as the Court knows, Augustine provided 12
13 documents to the Court for in camera review that were never
14 on the logs that were provided to 3M, the 12 mystery
15 documents.

16 Third, Kennedy Hodges, after we filed our motion
17 has disclosed on a new privilege log another ten documents
18 and produced one document that should have been on
19 Augustine's privilege logs. Now, the only way we were able
20 to get this after repeatedly trying to meet and confer was
21 filing this motion, which is something that we should not
22 have had to do.

23 And, fourth, the documents that the Court ordered
24 produced by Augustine reference or reveal the existence of
25 dozens of other documents, including e-mail attachments that

1 should have been produced or at least put on Augustine's
2 privilege log. We notified Mr. Benham and Kennedy Hodges of
3 these dozens of missing documents and to date we have no
4 response from Kennedy Hodges.

5 THE COURT: I'm sorry, say that again? How did
6 these documents come to light?

7 MR. HULSE: Sure, they're referenced in the
8 documents that the Court ordered produced.

9 THE COURT: Okay.

10 MR. HULSE: And if Your Honor would like, I
11 actually have a listing of these documents, but they range
12 all over time. Many of the e-mails will say, for example, I
13 sent you earlier my notes on this or I sent you a
14 presentation or I sent you a draft or I sent you a video.
15 None of that was logged. None of its been produced to us.

16 So our sense here is that the, more than our
17 sense, what is clear to us from what's now come out is that
18 there are probably double the number of communications
19 between Kennedy Hodges and Augustine than have actually been
20 revealed to us on a log or through the documents that were
21 produced in camera.

22 So it's clear to us that either by production or
23 privilege log that only a subset of the documents reflected
24 in the communications between Augustine and Kennedy Hodges
25 have been disclosed, and that what has been disclosed,

1 again, pointing to this instance of Mr. Benham puzzlingly
2 using that Kennedy Hodges e-mail address is that the
3 information that we've been receiving is not correct.

4 We shouldn't have to keep doing this. We
5 shouldn't have to keep coming back to the Court to get a
6 full disclosure of these communications that the Court has
7 repeatedly determined to be relevant. We believe that we
8 and the Court are entitled to a complete record of the
9 communications between Kennedy Hodges and Augustine.

10 What we are asking for here is that the Court
11 first take the ten documents that Kennedy Hodges has now put
12 on a privilege log, and I'm not certain whether that
13 privilege log has been provided to the Court; otherwise, I
14 have it here and undertake an in camera review of those
15 documents.

16 The second thing that we are asking for is that
17 Kennedy Hodges undertake a full diligent search of its
18 documents to identify any communications with Augustine and
19 either produce them or put them on a log and provide them to
20 the Court for in camera review.

21 We also ask that Kennedy Hodges be ordered to
22 provide a sworn declaration that they have not -- that they
23 have done so, that they have undertaken this comprehensive
24 search, along the lines of what the Court ordered Mr. Benham
25 to do.

1 Kennedy Hodges in its response says that it has
2 conducted a review, apparently in response to our motion,
3 but it's clear to us that that review was not thorough, and
4 it was not comprehensive. It does not include the
5 documents, the dozens of documents that we have identified
6 to them and Mr. Benham that we know exist based on the
7 documents the Court has ordered to be produced. And it by
8 coincidence, 10 of the 11 documents that they additional
9 documents that they have now disclosed to us are privilege,
10 we know there are significant numbers of nonprivilege
11 documents that exist.

12 Kennedy Hodges doesn't say whether this review
13 they undertook was comprehensive. They don't explain what
14 they did to conduct this review, and they certainly don't
15 explain why the Court should have any faith that they have
16 identified all communications with Augustine.

17 As I noted, all plaintiff's counsel, including
18 Kennedy Hodges, also have an affirmative duty in light of
19 the Court's March 7th Order on privilege to go back and look
20 at their responses to interrogatories, our interrogatories
21 and document requests, and to produce any communications
22 with Augustine that are not subject to privilege under the
23 terms of the Court's Order.

24 The Court's Order spells out several categories of
25 communications that are not privileged. These include

1 documents that, "reflect Augustine's thoughts or suggested
2 strategies about specific cases or potential cases."

3 Another is, "the initiative to publicize the *Walton* cases
4 and to solicit other lawyers to bring similar cases." The
5 Court concluded that any work product privilege was waived.

6 The only way to know whether documents that are in
7 Kennedy Hedges' possession fall into either of these
8 categories is to either provide a detailed privilege log or
9 for the Court to undertake an in camera review, and we
10 suspect that in camera review is really going to be the only
11 way to do this.

12 So just to round this out, Your Honor, the relief
13 we're asking for here is that the Court undertake an in
14 camera review of the ten newly listed documents on the
15 Kennedy Hedges' privilege log. The Court order Kennedy
16 Hedges to undertake a comprehensive search for
17 communications with Augustine and produce those that are not
18 privileged or disclose a privilege log of those it believes
19 are privileged, and also to provide a sworn declaration
20 explaining what it did to ensure that this search was
21 complete.

22 Lastly, less the Court think that this is the end
23 of the road, there will be more with Augustine to come.
24 Mr. Benham has not produced to us all of the documents that
25 the Court ordered him to produce. He has designated all or

1 most of the documents as confidential, despite the fact that
2 the Court has found that that confidentiality was waived by
3 disclosed to the public.

4 And, furthermore, of course, the documents that we
5 are seeking from Kennedy Hodges, we are also seeking from
6 Augustine. Thank you, Your Honor.

7 THE COURT: Okay. Mr. Hodges?

8 MR. HODGES: Your Honor, there's an old saying
9 that pigs get fat and hogs get slaughtered, and I think
10 that's applicable here. I want to be clear, Your Honor,
11 they're asking for documents from opposing counsel
12 concerning current litigation. My firm was under no duty to
13 go compare what had been produced from Mr. Benham, which, by
14 the way, I wasn't privy to many of these conversations that
15 Mr. Hulse and Mr. Benham had regarding these documents. I
16 was brought in later on towards the tail end and only by
17 Mr. Benham when I was copied by e-mail, and I asked for a
18 meet and confer so we can walk through this, and I was
19 denied that opportunity, and here we are.

20 The Court held in its order, the March 7th Order,
21 that there was an attorney-client privilege, and I respect
22 that it didn't apply. So no duty attached to me as an
23 attorney for Dr. Augustine to produce anything. There's
24 been no subpoena that's been issued to Kennedy Hodges.

25 There was a request for production that we

1 responded to, we complied with, and it's asking for
2 communications regarding the Bair Hugger Warming System or
3 HotDog, and we have complied with that, and the Court's
4 Protective Order that was entered in this case.

5 Mr. Hulse makes an assumption that there's this
6 whole litany of documents that have not been produced,
7 assuming that they even exist. These documents go back
8 years. Your Honor, as you will recall, a lot of this goes
9 back to 2008, I mean nine years. So documents don't exist.

10 There was a piece meal approach from what I could
11 glean from Mr. Benham's attempts to comply with the request.
12 And did he do a perfect job on that? Apparently not, but
13 that doesn't mean he was being deceptive in producing his
14 privilege log.

15 THE COURT: No, but clearly there are lots of
16 documents that appear to be communications between
17 Mr. Benham on behalf of Dr. Augustine and Kennedy Hodges
18 over a significant period of time, correct?

19 MR. HODGES: There was from 2008 forward.

20 THE COURT: And my question to Mr. Hulse was is
21 there a document request out there to either the plaintiffs
22 in this action or to Kennedy Hodges generally for those
23 documents? And your answer to that question is what?

24 MR. HODGES: I don't believe there's a request
25 specifically asking for those documents, Your Honor. There

1 was never other than a general request that was sent out to
2 all the plaintiffs and to all of the plaintiffs' law firms
3 that we then did do our own search. We put together --

4 THE COURT: And that document request asked for
5 what, documents?

6 MR. HODGES: It's documents, communications per
7 you and your attorneys and any person including but not
8 limited to current and former patients of any health care
9 provider regarding the Bair Hugger Warming System, Forced
10 Air Warming, the HotDog and/or SSIs. That's the request.

11 THE COURT: Okay. Is there a specific request for
12 communications between Kennedy Hodges and Dr. Augustine?

13 MR. HODGES: No, Your Honor.

14 THE COURT: Okay. And these ten documents that
15 you've put on a privilege log that Mr. Hulse was
16 referencing, is this the first privilege log that Kennedy
17 Hodges has produced?

18 MR. HODGES: It is.

19 THE COURT: Okay. Everything else that we've been
20 grappling with are all Benham-produced or Augustine-produced
21 logs, correct?

22 MR. HODGES: That's correct.

23 THE COURT: Okay. Go ahead. Anything else?

24 MR. HODGES: Your Honor, I'm going to point out,
25 and I think there is a distinction to be made here, and I

1 know we have argued about other courts entertaining this,
2 but these were requests that were specific to my law firm,
3 and 3M was denied relief by Judge Stacy in May of 2015 and
4 said you can go get these documents or go take a deposition
5 of Dr. Augustine.

6 Again, in September of 2015, then Judge Hoyt also
7 denied the very same motion to compel in this case. And
8 then Judge James also in October of 2015 also ruled that in
9 denying the relief that you can go get these documents
10 directly from Dr. Augustine or take his deposition, and
11 that's what they've done, Your Honor. I mean we are fully
12 in compliance.

13 I've never been involved in a case where my
14 opposing counsel wants me to go examine my e-mail server for
15 communications related to the litigation that we're in, and
16 I think it's highly inappropriate. And they've been denied
17 relief three times. There should be a stop from seeking it
18 once again a fourth time.

19 I've read the Order a couple of times, Your Honor,
20 and I do want to once again state at least for the record
21 there's again been absolutely no showing of relevancy
22 whatsoever by 3M on this. They've made no showing of
23 substantial need or undue hardship, that this was a rare or
24 extraordinary circumstances.

25 The documents that we have are those that I think

1 that within the Court's Order of March 7th, about thoughts,
2 legal analysis or strategy regarding the litigation or
3 potential litigation.

4 So, Your Honor, I ask that the Court deny the
5 motion to compel with respect to seeking documents or
6 anything further from my law firm.

7 THE COURT: Okay. Anything else, Mr. Hulse?

8 MR. HULSE: Right to your point, Your Honor. As
9 we pointed out in our submission, defendant's document
10 request number 25 says, "produce all documents relating or
11 referring to any communication between you or your attorneys
12 and the following entities and/or their owners, officers,
13 employees, agents, affiliates or representatives including
14 but not limited to Dr. Scott Augustine." And then we list
15 the various Augustine-affiliated entities.

16 We had also a copy cat interrogatory, so we asked
17 for all communications between plaintiffs, plaintiffs'
18 counsel, Dr. Augustine, and the Augustine entities both by
19 document requests and by interrogatory. And the response
20 came on behalf of the Plaintiffs' Executive Committee, which
21 includes the Kennedy Hodges firm, and Plaintiffs objected
22 and asserted the attorney-client and work product privilege
23 and stated no nonprivilege responsive documents exist.
24 That's what they said. They said there were no nonprivilege
25 responsive documents that reflected communications between

1 them and Dr. Augustine. That was not accurate.

2 There is no question that we have requested these,
3 and there is also no question that the Court on October 6th
4 advised all plaintiffs' counsel, all plaintiffs' counsel,
5 including the ones on the executive committee, but beyond
6 that too, to respond to these specific document requests.

7 We are here pursuing these from Kennedy Hodges
8 because every time we shake the tree with Mr. Benham, more
9 documents fall out. We have no confidence that we will ever
10 be getting a complete disclosure from Mr. Benham no matter
11 how many times we return.

12 THE COURT: Wait a minute. The privilege analysis
13 as it relates to Kennedy Hodges, who does represent
14 plaintiffs in this MDL, unlike Mr. Benham and unlike
15 Dr. Augustine, who is not a party to this litigation, the
16 privilege analysis as to Kennedy Hodges is different than
17 the privilege analysis as set forth in our Order from
18 earlier this month, correct or incorrect?

19 MR. HULSE: Not necessarily, Your Honor. We're
20 talking about the same communications here, the
21 communications between Kennedy Hodges and Augustine were the
22 subject of the Court's Order. So the problem is that there
23 are additional communications that clearly exist here that
24 we would have challenged and would have been subject to the
25 Court's in camera review.

1 THE COURT: Except Rule 26 talks about documents
2 and things prepared in anticipation for litigation by a
3 party or the party's representative, and we concluded in our
4 March Order, I believe -- there were many iterations of that
5 Order -- we concluded that Dr. Augustine, neither
6 Dr. Augustine nor Randy Benham were party representatives of
7 parties in the multidistrict litigation.

8 MR. HULSE: Right.

9 THE COURT: So our analysis of work product as it
10 related to them was one thing. Clearly, Mr. Hodges and his
11 firm are party representatives. Their lawyers for
12 plaintiffs in the MDL. So documents that they prepare in
13 anticipation of litigation are going to be treated
14 differently than documents that Dr. Augustine prepared, even
15 if they're communicated between the two people, correct or
16 incorrect?

17 MR. HULSE: That is absolutely what Your Honor
18 said. The issue here is that there are additional documents
19 that fall into the nonprivilege categories that the Court
20 has identified that are in the possession of Kennedy Hodges.
21 We just got produced one of them. We know those documents
22 exist. We believe based on the documents that were produced
23 that there are dozens of other documents. We presume that
24 Kennedy Hodges has kept these communications with Augustine
25 that are missing right now. And so the key is it's the

1 nonprivilege documents.

2 But we would also say that to the extent there are
3 privilege documents, those ought to go on a log, so that we
4 and the Court can assess the privilege too. The privilege
5 analysis that the Court has set out is detailed and
6 thorough, and it requires parsing of what the purpose was of
7 the communication and also whether there was an expectation
8 of disclosure as there was with the litigation guide that
9 was prepared by Augustine and then edited by Kennedy Hodges.
10 And the only way to know that is to get the documents on a
11 log.

12 So as I said, these are documents that we should
13 have gotten from Augustine, assuming Augustine has kept
14 them. We did not get a complete privilege log. We did not
15 get an accurate privilege log. We did not get a complete
16 production, so we're going to the other side of the
17 communications. Kennedy Hodges, which is the recipient or
18 sender of communications, and saying, "can we please get
19 these from you?" And the response has been "no, you can't
20 have them."

21 And so we're asking for the Court today to order
22 that these documents to the extent not privilege be
23 produced, and to the extent they're asserting privilege be
24 logged, so that we can ask the Court for an in camera
25 review.

1 THE COURT: All right. Thank you.

2 MR. HODGES: Your Honor, may I have a couple more
3 minutes?

4 THE COURT: You can have 30 seconds.

5 MR. HODGES: Thirty seconds, all right.

6 Your Honor, he's right. There was another
7 request, I guess, that I didn't know. I do note that it was
8 objected to, and that we responded that there were no
9 nonprivilege responsive documents. That is accurate. We've
10 given the log of what we have, Your Honor.

11 THE COURT: That's the ten documents we're talking
12 about. The log that you've just produced.

13 MR. HODGES: He has it. He has it. Most of those
14 documents, the vast majority of those documents that
15 Mr. Benham have I did not have. His is the most complete
16 set that exists, Your Honor.

17 THE COURT: What about this business of Benham
18 having an e-mail account at Kennedy Hodges? Are those
19 documents --

20 MR. HODGES: I don't have those documents.

21 THE COURT: Are you claiming those are Benham
22 documents not Hodges' documents?

23 MR. HODGES: I don't have those documents, period.
24 In fact, I didn't even recall that those documents existed
25 until they were brought up in connection with this. Those,

1 as I recall, that was in connection with distributing the
2 guide. It came from that address.

3 And I also want to point out, Your Honor, because
4 reading the Order, I don't know that the Court had a full
5 understanding of what happened. There was an e-mail that
6 had gone out saying, hey, here's -- there's a litigation
7 guide out here. Let us know if you want this guide or
8 whatever. It went out kind of like, you know, to a list.
9 However, it was only those people that affirmatively
10 responded and said, yeah, I want to get this, and I believe
11 that number was very, very low. I mean it could be counted
12 on one, maybe two hands of people that got that, and that
13 was only an abridged guide.

14 The full guide that was my understanding it never
15 went out to anybody, and I don't have a copy of that either.
16 And that e-mail address isn't on my server. It's not a
17 document that I have.

18 The other thing I wanted to point out, Your Honor,
19 that the Court did not have the benefit of and after going
20 through these documents or looking, we were able to find is
21 that we actually found the consulting agreement dated
22 January 29, 2013, with Dr. Augustine's companies. And I
23 think it's important because the Court held in the March 7th
24 Order that there was no consulting privilege. That's been
25 produced to the Court. That is the document that was

1 produced to 3M in connection with all of this.

2 So I would actually ask the Court to revisit this
3 issue as far as any communications after January 29th of
4 2013 that Mr. Benham produced because they were clearly
5 privileged under the consulting expert privilege as well.

6 I think that's all I have.

7 THE COURT: Okay.

8 MR. HULSE: Your Honor, if I may, just to speak to
9 a factual assertion. I promise it will take 10 seconds.

10 THE COURT: Ten seconds, and if you want to hear
11 your other motion, you better start talking.

12 MR. HULSE: I'll be quick. Mr. Hodges says he's
13 not the recipient of e-mails sent from this Gmail account.
14 Well, yes, he is. Here is an e-mail sent from this Gmail
15 account that is used by Mr. Benham, and it's forwarded to
16 dhodges@kennedyhodges.com. That's Mr. Hodges. There are
17 clearly communications from the kennedyhodgesllp@gmail.com
18 used by Mr. Benham --

19 THE COURT: What about this January 29th document?
20 Does that change the Court's analysis of whether or not
21 Benham is or is not a party representative under Rule 26?

22 MR. HULSE: No, no, Your Honor. First off, that
23 document is only dribbled off after extensive motion
24 practice on this. But Kennedy Hodges ended up telling us
25 and the Walton Court that he was not a consultant, so

1 whatever that e-mail says, he didn't end up being a
2 consultant.

3 And, again, this fact that we again having to
4 shake the tree and shake the tree, and here's another new
5 document after all this briefing and motion practice, we
6 think the Court should take that with a grain of salt.

7 THE COURT: All right. Let's move on to the next
8 motion.

9 MR. HULSE: All right. Thank you, Your Honor.

10 This is defendant's motion for a protective order
11 regarding subpoenas sent to five third-party manufacturers
12 of patient warming systems. I would just note today that
13 counsel for Stryker, Mr. Griffin, is present in the
14 courtroom. Stryker is one of the targets of the third-party
15 subpoenas.

16 The basis for the motion was that despite us
17 pushing, plaintiffs would not articulate the reason that
18 they believed discovery from these five third-party
19 manufacturers was relevant. We understand now that they are
20 not contesting relevance as to several of the subpoenas:

21 One is the Cincinnati Sub-Zero Blanketrol III, the
22 Medline PerfecTemp, the MTRE Allon, and the Medi-Therm
23 System by Stryker and Gaymar. These are conductive systems.
24 That is electric blanket-type systems, and thus, under the
25 terms of the Court's decision on the VitaHEAT subpoena,

1 those aren't relevant.

2 We are troubled that the subpoena targets
3 apparently were not notified of the VitaHEAT decision and
4 nor have these subpoenas ever been withdrawn, despite their
5 lack of relevance, but we have informed Stryker and Gaymar
6 and CSC. We are not certain. We've had no contact with
7 MTRE or Medline and don't even know what the status of those
8 subpoenas are.

9 There are two devices that are the subject of
10 plaintiff's subpoena: The Stryker Mistral-Air, and CSZ Warm
11 Air that use convective technology. Convective is
12 essentially forced air technology like the Bair Hugger. The
13 problem that we still here, Your Honor, is that the
14 plaintiffs' relevance showing is incredibly cursory. They
15 fail to explain what they think the discovery will gain them
16 beyond what they already know from public marketing
17 materials.

18 THE COURT: Let me interrupt for a second and just
19 make sure I've got the sort of outline correct. Unlike
20 VitaHEAT, as you stand here, you're not representing these
21 third-party --

22 MR. HULSE: No, Your Honor.

23 THE COURT: -- targets of the subpoena, correct?

24 MR. HULSE: That's correct.

25 THE COURT: You're here on behalf of 3M seeking a

1 Protective Order saying those subpoenas to these other folks
2 that I don't represent are irrelevant?

3 MR. HULSE: Right. Exactly, Your Honor. And
4 under some case law that we've cited as a party to the
5 litigation that will be burdened with this discovery if it
6 goes forward, we have standing to object to it.

7 Separately, Stryker, Gaymar, and Cincinnati
8 Sub-Zero have objected to this discovery. They have
9 objected based on relevance, but they also have additional
10 burden and breadth objections which are there to assert, and
11 they play out in some separate hearing whether in this
12 courtroom or some other courtroom that's local to their
13 operations.

14 THE COURT: And just to be clear, there's nothing
15 in the papers before me other than a letter from
16 Mr. Griffin.

17 MR. HULSE: That's correct, Your Honor.

18 THE COURT: Dated March 24th that -- strike that.
19 A letter from Mr. Griffin and a letter from Stryker itself,
20 it looks like, Ethan York. Is he in-house counsel at
21 Stryker?

22 MR. HULSE: He is, Your Honor.

23 THE COURT: So I have those two letters.

24 MR. HULSE: I also have the honor -- the honor,
25 apologies -- I have the letter that was sent by counsel for

1 CSZ to plaintiffs' counsel, if the Court would like a copy.

2 THE COURT: Okay. I don't.

3 MR. HULSE: Okay.

4 THE COURT: But just to be sure I'm clear though,
5 and Mr. Griffin I see is sitting here in the courtroom but
6 hasn't entered an appearance, and you don't intend to make
7 any argument regarding this motion, correct, Mr. Griffin?

8 MR. GRIFFIN: Correct, Your Honor.

9 THE COURT: You're just observing?

10 MR. GRIFFIN: I'm here in case there's a question
11 I can help.

12 THE COURT: Okay. I think I have the outline. Go
13 ahead, Mr. Hulse.

14 MR. HULSE: Thank you, Your Honor.

15 So, as I said, where we're left here is that for
16 four of the six third-party devices that are the subject of
17 the plaintiffs' subpoenas, those are conductive devices,
18 electric blanket-type devices like the VitaHEAT, doesn't
19 appear to be contested here, that those fall within the same
20 logic as the VitaHEAT ruling, and so we ask for the motion
21 for Protective Order to be granted with respect to those.

22 We also on separate grounds ask for the motion to
23 be granted with respect to the two convective devices, the
24 Stryker Mistral Air, and the Cincinnati Subzero Warm Air,
25 because the plaintiffs for two reasons, one is that the

1 plaintiffs' relevant showing is cursory and inadequate.
2 And, two, is because what they have not explained is how,
3 now that we are past the close of general causation
4 discovery. This discovery can be taken consistent with the
5 current case schedule. And that's really where I'd like to
6 focus my argument, Your Honor.

7 The cut-off for general causation discovery was
8 March 20th. That's last week. There are a handful of
9 things that by agreement we're getting done by March 31st
10 like Augustine's deposition, but the Court's Scheduling
11 Order said that discovery must be issued in time to be
12 completed by March 20th.

13 As of this date, there has been no discovery from
14 Stryker or Cincinnati Subzero. The plaintiffs have not
15 moved to compel against them. If the Court were to
16 authorize discovery, it's fair to say that Cincinnati
17 Sub-Zero and Stryker would also play out their other
18 objections, which could take quite a while, and we would not
19 be seeing production for likely several months to come.

20 Meanwhile, the plaintiffs' expert disclosures are
21 due March 31. Ours are due a few months after that. And it
22 is, and this discovery is clearly being sought under the
23 auspices of general causation discovery. Plaintiffs haven't
24 requested an extension of the discovery schedule, so it is
25 impossible to see how extensive discovery of these third

1 parties can be done within the scope of the existing
2 schedule. And we think that's something that ought to be
3 taken into consideration here and is further grounds for
4 granting the motion for a protective order.

5 Separately, what plaintiffs are pointing to here
6 in articulating for the first time in their papers the
7 relevance of this discovery of these two convective devices
8 is, first and foremost, that the two devices employ,
9 according their marketing materials, HEPA filters.

10 Plaintiffs since May of last year at Science Day have been
11 arguing that a HEPA filter should be used in the Bair Hugger
12 Forced Air Warming System. The Court has heard this many
13 times. It's been a refrain from the beginning.

14 Yet, they did not seek this discovery from Stryker
15 and Cincinnati Sub-Zero apparently relating to the use of a
16 HEPA filter until here at the very end of the fact discovery
17 period. They've known about this. This has been their
18 argument for nine months, and yet, and they had ample
19 opportunity to seek this discovery, and they didn't until
20 the end, and that also militates in favor of granting our
21 motion for protective order.

22 The one other thing that I'd like to add, Your
23 Honor, is that if the Court is going to let any of this
24 discovery go forward, it needs to be narrowly tailored to
25 the case -- in accordance with the case law about feasible

1 safer alternative designs. What plaintiffs have said is if
2 we get this discovery, we shouldn't be limited in any way,
3 shape, or form, and the discovery they served is similar in
4 scope to the discovery that they served on 3M. That
5 discovery must be narrowly tailored to deal with the
6 specific components that they allege should be incorporated
7 into the 3M Bair Hugger system.

8 And so we'd ask to the extent Your Honor allows
9 that discovery to go forward, that it also direct that it be
10 narrowly tailored on that basis. If so, that might allow
11 for the discovery to be done sometime three or four months
12 from now. Certainly, the blunder bust discovery that they
13 sought right now can't be done any time soon.

14 But our baseline concern here with those remaining
15 convective devices is it's just too late. This discovery
16 cannot be done in a way that can -- it's certainly past the
17 discovery deadline for general causation, and it can't be
18 done consistent with the expert schedule.

19 THE COURT: But it is relevant, correct? You
20 don't object?

21 MR. HULSE: Well, we don't think it's relevant,
22 Your Honor, because our viewpoint of the case law is that a
23 different device cannot be relevant, but we understand the
24 Court's VitaHEAT Order to contemplate that another
25 convective device, a component of another convective device

1 might meet the relevance standard for the purpose of
2 discovery, at least. That's at least how we understood Your
3 Honor's Order. And so that's, you know, while we preserve
4 our general position that other devices can't be relevant.
5 We recognize that's the lay of the land.

6 THE COURT: Okay. Thank you.

7 MR. FARRAR: Your Honor, excuse me, Kyle Farrar
8 for the plaintiffs, and I don't believe I've had a chance to
9 speak in front of you yet.

10 Additionally, I'm struck by the irony of the two
11 motions 3M brought. They want discovery from plaintiff's
12 counsel on a device that has conductive in a company that
13 does conductive warming and prohibit discovery from the
14 plaintiffs of a company that does convective warming.

15 Obviously, companies that do convective warming are
16 relevant. The case law is clear that safer alternative
17 designs are always relevant. And I think Mr. Hulse conceded
18 relevancy to some extent, but it's not limited as their
19 papers say, and as I think as Mr. Hulse was trying to allude
20 to a specific component. He wants to limit it to the HEPA
21 filter, for instance.

22 But there's more because Mistral talks about in
23 their marketing materials how the blanket has a diffusion so
24 it doesn't disrupt the flow of the air in the operating
25 room. The Warm Air talks about how it has two filters. The

1 blanket itself serves as a filter. So these are safer
2 alternative designs. They're things that we pled in our
3 master form on paragraph 81, and we're entitled to discovery
4 of it.

5 The case I think that is probably the most on
6 point for the issue is the *In Re: Mentor*. It's a Westlaw
7 cite. It's out of the Middle District of Georgia regarding
8 the transvaginal mesh. And it talks about what the
9 threshold showing of relevance is.

10 And it says, "if plaintiff's request are
11 reasonably calculated to lead to the discovery of evidence
12 regarding a feasible design that is safer than the subject
13 design, then those requests satisfy plaintiff's threshold
14 burden of establishing relevance."

15 Clearly, the stuff that we're asking for is
16 relevant. We're asking for the exact same things that were
17 asked for in the *In Re: Mentor* case. It is the 510(k)
18 submissions, the design documents, and the testing. And *In*
19 *Re: Mentor* is directly on point. It says, look, you have to
20 not only produce the outside testing, the literature that
21 you're aware of that supports your safety condition, but
22 also your internal, your 55 internal tests that were done.
23 So I don't think there's a credible argument as to the
24 relevance of the information we sought.

25 As to the timing, it's the first time I heard in

1 the argument it's not in their papers. But the subpoenas
2 were served, and the answers were due before the end of the
3 discovery period. It's the discovery period. We don't have
4 to do all of the discovery in the front of it. We get the
5 full-time of the discovery period. So the fact that the
6 answers were due before the discovery period ended means
7 they're timely subpoenas.

8 And I think the last argument, Your Honor, is
9 getting back to the relevancy, but if the documents aren't
10 relevant, I'm not positive why 3M is complaining about it.
11 I mean we're going to review some documents. It's not
12 significant. If they're not relevant, then don't review
13 them at all if you don't want to, if you know they're not
14 relevant.

15 Obviously, the issues go to the heart of our
16 design defect claim and relevant, and we think we're
17 entitled to them, Your Honor.

18 THE COURT: All right. Thank you. Anything else,
19 Mr. Hulse?

20 MR. HULSE: No, Your Honor.

21 THE COURT: All right. Thank you all very much.
22 I will take both motions under advisement and issue a ruling
23 shortly, and we are in recess. Thank you.

24 (Proceedings concluded.)

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5 REPORTER'S CERTIFICATE
6

7 I, Maria V. Weinbeck, certify that the foregoing is
8 a correct transcript from the record of proceedings in the
9 above-entitled matter.

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11 Certified by: s/ Maria V. Weinbeck

12 Maria V. Weinbeck, RMR-FCRR
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